Taking the Profit Out of Crime: The UK Experience

1. INTRODUCTION: THE PRINCIPAL ISSUES

1.1. Background

In England and Wales, the theory underlying confiscation is that it relieves the criminal of financial gain from unacceptable social behaviour. It is not part of the punitive component of the sentence and does not mitigate or aggravate it. However, whatever the theoretical status of this as jurisprudence – and, raising interesting issues for retributivists, from the Proceeds of Crime Act 1995 all newly convicted criminals (and not just drugs traffickers) are liable to have their assets confiscated unless they can show the court that they have been acquired legitimately – those involved in investigating the proceeds of crime view confiscation as an attack that truly hurts the criminal by depriving him of the monetary benefits that he covets most, and by undermining his credibility as a criminal. The criminal who convinces his jailmates that ‘his’ assets are waiting for him when he is released, gains status in the eyes of his fellows; conversely, the one who is publicly stripped of ‘his’ assets loses status.

Another ‘philosophical’ justification for confiscation is its possible deterrent value. If criminals are convinced that ‘crime does not pay,’ and that (if caught) they will be unable to retain their ill-gotten gains, then, presumably, at least some criminals will be deterred from committing certain crimes (and because not all are deterred does not mean that no-one is deterred). Some of my interviews with offenders would suggest that many view the proceeds of crime as their ‘entitlement’, and removing this presumed entitlement would naturally cause resentment and be seen as ‘punishment’. Prima facie, however, there seems no reason to expect that such confiscation will lead such individuals to abstain from crime in future – it might simply lead to greater determination to ‘get their just desserts’ (as they see them) though, as in ‘snakes and ladders’ (or the ‘Go to Jail card in Monopoly), they may find it hard to get back to where they were before. Moreover if – as is the view of the police as well as myself – many of the proceeds of crime are spent before arrest (and a fortiori, before confiscation), the deterrent as well as punitive and reparative effects will be modest. Finally, in the so-called ‘war’ against Organized Crime (as opposed to organized white-collar or political crime), it is believed that asset forfeiture (as it is termed in the US) or confiscation (in the UK) will incapacitate the organization by removing its financial lifeblood, eliminating its capacity to trade and reducing its attractiveness to recruits. (Though if one accepts the model of

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disorganized crime, the likely impact is more problematical and we fall back to the more individual deterrent effect.)

For these mixed philosophical and pragmatic purposes, ‘taking the profit out of crime’ has been an important rhetorical motif in the English-speaking developed world for the past decade, whose pace in Europe has accelerated since the 1991 Council of Europe Convention on Money-Laundering and Confiscation of the Proceeds of Crime. It also carries with it the potential for making some areas of police investigation financially self-sufficient, though this was never the motivation behind the confiscation legislation in England and Wales, where it is conventionally disapproved in the informal constitution to allow government income to be set against particular expenditure functions.

By contrast with the almost complete absence of interest among British academics, forfeiture principles have been the subject of heated debate in the US courts and academic circles. In *Halper* 109 S. Ct. 1902, the Supreme Court held that the remedial purpose of forfeiture is not sufficient to excuse it from punishment. The US consideration of whether forfeitures violate the ‘excessive fines’ issues of the 8th amendment (based on the 1689 English Bill of Rights) are important for considering the extension of laws reversing the assumptions that all assets are the proceeds of crime unless proven otherwise.

Using observational and interview methods – including interviews with police and lawyers from the US, Australia and Canada, and the detailed analysis of case files, the objectives of my project were to establish, as far as possible:

(i) the impact of asset freezing and confiscation provisions on the organization of crime;
(ii) those investigative strategies and resource deployments which are most likely and least likely to produce benefits;
(iii) the plausible limits of asset confiscation strategies as an approach to tackling organized crime;
(iv) any changes in the legislative and institutional framework of policing which would improve the monetary and arrest yield of financial investigation.

2. LEGISLATIVE FRAMEWORK FOR RESTRAINT AND CONFISCATION IN ENGLAND AND WALES

For reasons of space and priority, the outline of the law will be brief. In England and Wales, the drive towards confiscation started in earnest in 1982 following a case in which the House of Lords expressed its dissatisfaction with the inability to reclaim the proceeds of the ‘Operation Julie’ LSD manufacturing case, since these funds were not ‘the instrumentalities of crime’ covered by English forfeiture law. This led to periodic bursts of legislation, but until 1994, no research on impact.

The confiscation process can be most meaningfully divided into four stages: investigation; restraint of proceeds; confiscation; and actual recovery of assets. The powers granted, and the

3. For academic examples, see L. Levy, *A License to Steal* (Chapel Mill 1996), and M. Tonry, in this issue.
4. See also Justice Scalia’s comments in *Austin v. United States* (1993) 113 S.Ct. 2801.